

1 Rio Hondo and San Gabrielle River where a significant
2 amount of groundwater recharge is known to occur.

3 The Burbank permit, in contrast, discharges to
4 surface water bodies that are lined, except for one
5 stretch in the Glendale Narrows area where rising
6 groundwater causes an upwelling flow of groundwater to the
7 L.A. River.

8 Because the Regional Board has not established a
9 hydrogeologic pathway between Burbank's flow in the
10 underlying groundwater or that Burbank's effluent is
11 causing any exceedances of groundwater standards, we feel
12 it's not appropriate to establish limits for the Burbank
13 Plant based on the groundwater beneficial uses or to
14 establish limits in their NPDES permit.

15 Thank you for your time.

16 CHAIRPERSON NAHAI: Thank you very much.

17 Next Mr. Gus Dembegiotes, City of Los Angeles,
18 Bureau of Sanitation.

19 MR. DEMBEGIOTES: Good morning. I'm Gus
20 Dembegiotes with the City of Los Angeles's Bureau of
21 Sanitation. And we also submitted comments on October
22 2nd. I'm not going to go through all of them. But I just
23 wanted to touch on a couple of issues.

24 The first one is in regards to the application of
25 primary and secondary drinking water standards. We agree

1 with Burbank. We do not believe that the secondary and
2 primary drinking water standards should be applied as they
3 are in this permit based on the potential recharge in the
4 Los Angeles River narrows region.

5 We also believe as Burbank stated that the
6 predominant characteristic of the narrows area is
7 upwelling. That's what was in your TMDL that was adopted.
8 That's why we're going through this study to try to
9 determine how much nitrogen loading there is in this
10 region. We also point to the geology of the area of the
11 narrows area which limits the amount of recharge that
12 could occur. I mean, south of the Los Feliz bridge, it's
13 known people go there to see the groundwater upwelling
14 sort of like artesian springs that come up from the
15 groundwater. It is an area of upwelling. That's why it
16 was unlined by the Army Corps. of Civil Engineers. We
17 don't believe there is any recharge occurring in that
18 area.

19 Also the Bureau believes there are no objectives
20 for groundwater recharge in the Basin Plan. The
21 objectives are for surface water and more particularly for
22 MUN, the MUN beneficial use.

23 One other final issue that we wanted to talk
24 about too is that if for some reason the primary and
25 secondary drinking water standards are maintained in the

1 permit, we believe they should be used as the way they are
2 presented in Title 22. For compliance purposes, Title 22
3 applies those requirements as an annual average, not as
4 monthly averages. We don't believe that it's proper to
5 have the Burbank Treatment Plant held to a higher more
6 stringent standard than what we would hold a water
7 purveyor who's supplying potable drinking water directly
8 to its customers. So we believe that those limits, if
9 they are maintained in this, should be used as they are in
10 Title 22, which is as annual averages.

11 I know that staff points to the U.S. EPA's TSD
12 technical support document for providing monthly averages,
13 but it does not -- it's a guidance in setting limits. It
14 does not prohibit the use of annual averages. And again,
15 it should be the same as it is in the Title 22
16 requirements. They should be annual averages if used at
17 all. Thank you.

18 CHAIRPERSON NAHAI: Thank you very much.

19 Mr. Bryan Brock.

20 MR. BROCK: Good morning, Mr. Chair, members of
21 the Board. My name is Bryan Brock, and I'm with the
22 engineering firm NEXGEN Engineering Management
23 specializing in regulatory compliance and implementation
24 of new SSO WDRs.

25 I've been asked by several entities to make a

1 presentation today to talk about the intent of the
2 recently adopted WDRs. And why they namely asked me was
3 because I was actually the author and chief cat herder of
4 the new WDRs that were implemented.

5 I would like to say today I'm not being
6 compensated for my time. Like Mr. Secundy, Board Member
7 Secundy, I cannot be compensated for appearing in front of
8 you. But I can -- what was the law that you quoted today?
9 The Political Reform Act.

10 So I'd just like to talk a little bit about the
11 intent and the process associated with adoption of the
12 WDRs back in May of this year. You know, the statewide
13 WDR was developed to provide a comprehensive and statewide
14 consistent approach to managing sanitary sewer systems and
15 reporting SSOs.

16 Throughout the WDR, you will see that it is the
17 intent of the Board to have one message to all communities
18 throughout the state of California to comply with. That
19 includes reporting. That includes monitoring and things
20 of that nature.

21 In the fact sheet, which was adopted as part of
22 the WDR -- I can give that to everybody -- it states that
23 in order to provide a consistent and effective SSO
24 prevention program as well as develop reasonable
25 expectations for collection system management, these

1 general WDRs should be the regulatory mechanism to
2 regulate public collection systems.

3 Now there are three requirements that are
4 identified in the fact sheet that have to be as part of
5 the Federal Clean Water Act in an NPDES permit, and that's
6 the duty to mitigate discharges 40 CFR 122.41(d);
7 requirements to properly operate and maintain facilities,
8 40 CFR 122.41(e); then requirement to report
9 non-compliance, 40 CFR 122.41(i)(6) and (7).

10 There's a widely distributed in circulation out
11 there memo that's going to come from Celeste Cantú in the
12 next week or two to all of the executive officers that
13 talk about how the WDRs should be implemented statewide.
14 And in that, it talks about those entities that are coming
15 up for NPDES permit renewals. It says the State Water
16 Board and Regional Water Boards are required to collect --
17 excuse me. Wrong section.

18 When the WDR or NPDES permits are revised or
19 reissued, the Regional Water Board should in most cases
20 remove the sanitary sewer system provisions in the
21 existing WRDs or NPDES permits and rely on the sanitary
22 sewer system order to regulate the sanitary sewer systems.
23 Although there may in some circumstances be a necessity to
24 retain sanitary sewer provisions over time, over time,
25 requirements of sanitary sewer systems should be separated

1 in order concerning wastewater treatment plants.

2 Never the less, NPDES permits must at a minimum
3 include those three federally required requirements that I
4 have just spoke of. These conditions are contained in the
5 NPDES permit template.

6 So I guess my point is that anything that talks
7 about sanitary sewer systems and the management and the
8 reporting of those systems should not be contained in an
9 NPDES permit. Only the three standard provisions that
10 apply to the Federal Clean Water Act that have to be in
11 the NPDES permit should be. This is not only my opinion
12 when I was working for the Water Board, but it was the
13 intent of the Board to do this. And further
14 implementation of recommendations from the Water Board
15 will be coming out soon that are saying the exact same
16 thing. Thank you.

17 CHAIRPERSON NAHAI: Let's go on.

18 Next card is Dr. Mark Gold.

19 SENIOR STAFF COUNSEL LEVY: Mr. Chair, may I
20 respond to the comments from the previous speaker, please?

21 CHAIRPERSON NAHAI: Dr. Gold, did you take the
22 oath?

23 MR. GOLD: No. I was just going to say I did not
24 take the oath.

25 CHAIRPERSON NAHAI: We'll do that in just a

1 second.

2 SENIOR STAFF COUNSEL LEVY: In brief response,
3 first of all, Board staff expressed no opinion about
4 Mr. Brock's compliance with the Political Reform Act. And
5 we don't want to leave an impression that we're adopting
6 his points in that respect.

7 Secondly, Mr. Brock read from page 8 of the fact
8 sheet of the general WDRs. I'll read from page 9 of the
9 fact sheet.

10 CHAIRPERSON NAHAI: Well, we'll do this later on,
11 because this appears to be in the form of a rebuttal. And
12 I don't want to take it out of context.

13 I would like to know at some point when Mr. Brock
14 left the Water Board though, but that too can be answered
15 later on. That's okay.

16 Go ahead, please.

17 MR. GOLD: My name is Mark Gold, Executive
18 Director of Heal the Bay. I think I need to take the
19 oath.

20 CHAIRPERSON NAHAI: Go ahead.

21 (Thereupon all prospective witnesses were sworn.)

22 MR. GOLD: Thank you.

23 On behalf of Heal the Bay, we have the following
24 comments on the Burbank NPDES permit.

25 Overall, it seems like a pretty straightforward

1 permit from the standpoint of what Heal the Bay has been
2 reviewing and for the POTWs and all the discharge permits
3 that you guys have done that are similar to these in the
4 last couple of years.

5 One of the things we did want to bring up was in
6 relation to the toxicity issue which keeps coming up time
7 and time again. And once again -- and I wish Board Member
8 Secundy was here to hear this again. Is that not having a
9 State Water Board policy on acute and chronic toxicity is
10 really weakening these permits. And I know we've asked
11 you time and time again to really impress upon the State
12 Water Board that this is a high priority. And the end
13 result is we end up having lots of permits going forward
14 with toxicity issues that are going to have to be
15 addressed and fixed later. And this is obviously not the
16 way that state water policy should go forward.

17 In particular, in this case, looking at what was
18 provided by your staff, there were eight exceedances of
19 the chronic toxicity narrative in '04 and '05 that's in a
20 two-year period. That's a lot of toxicity exceedances in
21 a short period of time. This is really important, because
22 when you get Glendale and Tillmen next month, it's going
23 to really come up, because there's a lot more toxicity
24 issues at those facilities than they are here at Burbank.

25 And we still don't know where the toxicity is

1 coming from. Or maybe staff does or Burbank does, and it
2 was not provided within the materials that we received.
3 It can't be ammonia, because they've done an excellent job
4 of implementing their nitrification and denitrification
5 facilities, something they absolutely deserve to be
6 commended for and something you won't see obviously at the
7 Tillman and Glendale facilities next month or they're way
8 behind. Is it due to selenium exceedances? You saw a
9 whole list of other exceedances that were occurring. But
10 very, very unclear. If you have toxicity problems, I
11 think it's very, very important to find out what is
12 actually causing the toxicity if it's not exceedances of
13 the numeric effluent limits. And so that's an important
14 point that keeps slipping in one discharger after another
15 in these permits.

16 One of the things that we saw was there was a
17 conflict in the monitoring and reporting section on pages
18 T-12 and the T-13 versus what's in the permit on page 35
19 on the requirements for toxicity identification evaluation
20 and when it's required. It appears in the permit that a
21 TIE needs to go forward when you reach the threshold of
22 three exceedances out of six in the accelerated monitoring
23 program. But if you look at the monitoring and reporting
24 program on T-12/T-13, it appears that that's optional and
25 that they may go forward and do a TEI in the process of

1 doing their toxicity reduction evaluation, their TRE. So
2 we're saying at a minimum the Regional Board should change
3 the language in the monitoring reporting section, getting
4 rid of the word "may" and putting in the word "shall"
5 initiate a TIE in the event you have three out of six
6 exceedances for toxicity. We think that's very, very
7 important.

8 Under the discharge requirements and the effluent
9 limitations, Item 12 provides a median trigger of one TUC
10 in a daily max, trigger of one TUC. However, the permit
11 does not describe what's triggered for the daily max. So
12 the Regional Board should modify Section 12C to read that,
13 "if the chronic toxicity effluent exceeds the monthly
14 median trigger or the daily maximum of one TUC, then the
15 discharger shall immediately implement accelerated chronic
16 toxicity testing." Maybe that was the intent, but it
17 seemed unclear in looking at that in particular.

18 On a couple of other issues, moving off of the
19 toxicity issues, we brought up this issue again and again,
20 which is that the mass emissions limits are based on the
21 plants design, flow rate of nine million gallons per day,
22 even though they're discharging a flow of 5.8 million
23 gallons per day. So this is not actually protective of
24 receiving waters. There's obviously a big difference
25 between 5.8 and nine million gallons per day.

1 It's still unclear from the response to comments
2 for us on why a reasonable potential analysis was not
3 conducted on constituents other than nutrients using data
4 prior to 2003. We understand that the NDN facilities did
5 go forward. Obviously, had a huge impact on nitrate
6 concentrations as well as ammonia concentrations. Again,
7 we commend Burbank for the great work in that facility.
8 But we still don't know why that means you don't look at
9 all the other toxic metals and organics and those issues
10 prior to the completion of those facilities. The answer
11 that was given to us doesn't make sense technically. And
12 so that's something that I think is also very important.

13 On the issues of interim effluent limits for
14 seven constituents for the life of the permit, here we go
15 again on the standpoint of having long compliance
16 schedules within -- I see I have to wrap up. And so such
17 long compliance schedules and periods are inappropriate
18 concerning the CTR was adopted in April 2000. This is
19 something that obviously Burbank should have been working
20 on for the last six years. And dischargers have been
21 noticed about these limitations for several years.

22 To give you an example, for copper, we are
23 looking at required limits at 16 and 30. On the interim
24 limits, 64. Selenium, where they have violations, the
25 same thing is occurring as well. So we think that's an

1 issue again with compliance schedules where the discharger
2 is given far too long to comply.

3 Thank you.

4 CHAIRPERSON NAHAI: That concludes all of the
5 cards that I have. So we go to the next segment of the
6 proceedings, which is cross examination of witnesses by
7 each of the parties.

8 Michael, does the Board go first?

9 SENIOR STAFF COUNSEL LEVY: We waive
10 cross-examination.

11 CHAIRPERSON NAHAI: You waive cross-examination.
12 All right. So the City of Burbank may conduct its cross
13 examination.

14 MS. THORME: Before I begin, Mr. Chairman -- my
15 name is Melissa Thorme from Downey Brand representing City
16 of Burbank.

17 I'd like to put on the record before I start
18 cross-examination an objection. I was informed that Mr.
19 Levy is performing both the roles of advisor to the staff
20 and to the Regional Board members today. And so we would
21 object to that dual role of counsel. There's lots of case
22 law in the separation of duties and the conflict of
23 interest of representing both Board and staff in an
24 adjudicative hearing. So we would like to put that
25 objection on the record before I begin.

1 CHAIRPERSON NAHAI: Do you have a response to it
2 at this time?

3 SENIOR STAFF COUNSEL LEVY: Yes, I do. The
4 Administrative Procedures Act, Government Code Section
5 111425.10 refers to separating functions when the staff is
6 investigating, prosecuting, or advocating. And we're not
7 doing that. We're advising the Board of what it should do
8 in a permitting proceeding. This is squarely unlike an
9 investigative proceeding on enforcement order where a
10 separation of function is required. It is not necessary
11 to separate functions in this type of proceeding.

12 CHAIRPERSON NAHAI: Thank you for that
13 explanation.

14 You've made your objection for the record. It's
15 been responded to. Let's carry on now. We'll set the
16 timer now for ten minutes.

17 MS. THORME: Could I have Ms. Ponek-Bacharowski
18 back?

19 CHAIRPERSON NAHAI: How many witnesses do you
20 wish to cross-examine?

21 MS. THORME: I believe she's the only one.
22 Hopefully, this isn't counting against my time.

23 CHAIRPERSON NAHAI: No, it hasn't been set. All
24 right. Let's start.

25 MS. THORME: You stated in your testimony that

1 there was a reactivation of the rescinded permit 96-050.

2 Can you tell me how that was reactivated?

3 MUNICIPAL PERMITTING UNIT CHIEF

4 PONEK-BACHAROWSKI: I would like counsel actually to
5 answer that. But my understanding is that when the one
6 order was stayed, that you fall back on the other. So
7 that there's some type of permit limit in the -- some type
8 of enforceable permit limit.

9 MS. THORME: So was there ever a hearing to
10 reactivate that rescinded permit?

11 MUNICIPAL PERMITTING UNIT CHIEF

12 PONEK-BACHAROWSKI: Not that I know of.

13 MS. THORME: On the groundwater issues, is it
14 your testimony that groundwater is required to be
15 protected under the Clean Water Act?

16 MUNICIPAL PERMITTING UNIT CHIEF

17 PONEK-BACHAROWSKI: Groundwater is required to be
18 protected under this NPDES permit, which is also waste
19 discharge requirements to protect waters of the state.

20 MS. THORME: But that didn't answer my question.

21 MUNICIPAL PERMITTING UNIT CHIEF

22 PONEK-BACHAROWSKI: Under the Clean Water Act?

23 SENIOR STAFF COUNSEL LEVY: I'm going to object
24 in that the attorney is asking staff for a legal
25 conclusion.

1 MS. THORME: You can answer that question.

2 SENIOR STAFF COUNSEL LEVY: If you know the
3 answer, you can answer the question. The groundwater
4 recharge beneficial use is an approved beneficial use by
5 U.S. EPA. So it's a federal standard and must be
6 protected.

7 MS. THORME: Are you testifying now, Mr. Levy?

8 SENIOR STAFF COUNSEL LEVY: I'm answering a legal
9 inquiry.

10 MS. THORME: Is groundwater recharge an existing
11 use in the Burbank Western Channel?

12 MUNICIPAL PERMITTING UNIT CHIEF

13 PONEK-BACHAROWSKI: No. Not in the Burbank Western
14 Channel.

15 MS. THORME: Is it an existing use in all of the
16 L.A. River to the estuary?

17 MUNICIPAL PERMITTING UNIT CHIEF

18 PONEK-BACHAROWSKI: All of them except the estuary.

19 MS. THORME: Okay. Isn't most of it, the L.A.
20 River, concrete lined?

21 MUNICIPAL PERMITTING UNIT CHIEF

22 PONEK-BACHAROWSKI: A good portion of it is, yes.

23 MS. THORME: What criteria in the Basin Plan
24 applies to the groundwater recharge use?

25 MUNICIPAL PERMITTING UNIT CHIEF

1 PONEK-BACHAROWSKI: The surface water has a groundwater
2 recharge beneficial use. The underlying groundwater has
3 an MUN existing use.

4 MS. THORME: That wasn't my question. My
5 question was what criteria or water quality objectives
6 apply to the groundwater recharge use?

7 MUNICIPAL PERMITTING UNIT CHIEF

8 PONEK-BACHAROWSKI: Oh, I'm sorry. In the Basin Plan, it
9 says that groundwater shall not contain constituents in
10 excess of Title 22 MCL, the state drinking water
11 standards.

12 MS. THORME: Right. But for the groundwater
13 recharge beneficial use, are there objectives you can
14 point me to in the Basin Plan that apply to that specific
15 use?

16 MUNICIPAL PERMITTING UNIT CHIEF

17 PONEK-BACHAROWSKI: No. We've linked them, and there was
18 also in the precedential decisions for County San, the
19 State Board upheld that we link those to beneficial uses.

20 MS. THORME: In the Glenn Narrows area, is that
21 generally known as a gaining reach and upwelling zone?

22 MUNICIPAL PERMITTING UNIT CHIEF

23 PONEK-BACHAROWSKI: At times of the year, it is. However,
24 the bulletin 118 with the State geology says that in that
25 southern area that groundwater can fluctuate between I

1 believe it's 20 and 40 feet, in other parts of the valley
2 even more. And that's even been after the adjudication.

3 I did go back and I looked at groundwater
4 monitoring wells from our leaking underground storage tank
5 program, which is part of -- the Board is well aware of
6 that. It's a database that can be obtained by any person
7 in the public. And that showed -- and I have the graphic
8 if you would like it. That shows that groundwater
9 monitoring wells along that reach can be -- groundwater
10 can be as deep as 60 feet below land surface. Given that
11 the side walls of the channel there are about 20 feet, you
12 still have groundwater at a depth of 45 feet below ground
13 surface, which tells me that it's not zero elevation and
14 there is mixing of both surface water and groundwater.
15 It's exacerbated at times when there's drought when the
16 groundwater table drops even more.

17 MS. THORME: Okay. Was there a load given to
18 groundwater for the nutrient TMDL?

19 MUNICIPAL PERMITTING UNIT CHIEF

20 PONEK-BACHAROWSKI: I don't believe so.

21 MS. THORME: Do you have any data showing that
22 groundwater levels are approaching the MCLs for the
23 constituents for which effluent limits were given based on
24 the groundwater?

25 MUNICIPAL PERMITTING UNIT CHIEF

1 PONEK-BACHAROWSKI: I do not. However, I do know that we
2 don't have to wait until groundwater is impacted before we
3 protect it. And that's exactly what we were trying to do
4 in this permit.

5 MS. THORME: Does that have to be done in an
6 NPDES permit?

7 MUNICIPAL PERMITTING UNIT CHIEF

8 PONEK-BACHAROWSKI: It's done under waste discharge
9 requirements which are also in the NPDES permit.

10 MS. THORME: Could they have been done separately
11 in a separate WDR?

12 MUNICIPAL PERMITTING UNIT CHIEF

13 PONEK-BACHAROWSKI: We don't normally do that. We do that
14 because this is also waste discharger requirement.

15 MS. THORME: That wasn't my question. Could you
16 have done it in a separate waste discharge requirement?

17 MUNICIPAL PERMITTING UNIT CHIEF

18 PONEK-BACHAROWSKI: We probably could have.

19 MS. THORME: Do you know how long Burbank has
20 been discharging to the Burbank Western Channel and L.A.
21 River?

22 MUNICIPAL PERMITTING UNIT CHIEF

23 PONEK-BACHAROWSKI: I can't tell you long. They've been
24 there a while.

25 MS. THORME: From the slides that Mr. Anderson

1 put up there --

2 MUNICIPAL PERMITTING UNIT CHIEF

3 PONEK-BACHAROWSKI: I'm trying to remember when the
4 plant -- right off the top of my head, I couldn't tell
5 you.

6 MS. THORME: It was 1966 on his slides earlier.
7 So would you say 40 years was --

8 MUNICIPAL PERMITTING UNIT CHIEF

9 PONEK-BACHAROWSKI: Yes.

10 MS. THORME: Did you consider dilution and
11 attenuation when you put those effluent limits to protect
12 groundwater?

13 MUNICIPAL PERMITTING UNIT CHIEF

14 PONEK-BACHAROWSKI: We did not, because no such study had
15 ever been submitted to us. And we would entertain that if
16 it were ever submitted in future.

17 MS. THORME: Did you consider the groundwater
18 data that was submitted by the City?

19 MUNICIPAL PERMITTING UNIT CHIEF

20 PONEK-BACHAROWSKI: The groundwater quality data, we did
21 not.

22 MS. THORME: What evidence in the record supports
23 the limits to protect groundwater?

24 MUNICIPAL PERMITTING UNIT CHIEF

25 PONEK-BACHAROWSKI: It is a Basin Plan objective. We

1 don't have to wait until groundwater is contaminated
2 before we protect it.

3 MS. THORME: I'm asking you for specific evidence
4 and things that document that can you site me to.

5 SENIOR STAFF COUNSEL LEVY: Mr. Chairman, may she
6 be allowed to finish her answer? It seems to me it's
7 inappropriate for counsel to cut her off in the middle of
8 her explanation. She's trying to give an explanation.

9 CHAIRPERSON NAHAI: All right. Go ahead and
10 finish what you were saying, Ms. Bacharowski.

11 MS. THORME: Well --

12 MUNICIPAL PERMITTING UNIT CHIEF

13 PONEK-BACHAROWSKI: Well, again, we did not have an
14 attenuation study. We know what some of the constituents
15 are in the groundwater. But our feeling was we didn't
16 want to wait until groundwater was contaminated before we
17 put an end-of-pipe limitation to protect that groundwater.

18 We also make a linkage between the surface
19 water/groundwater recharge and the fact there was MUN
20 beneficial use of the groundwater. Again, the State Board
21 upheld us in that decision.

22 MS. THORME: Okay. When new MCLs are adopted by
23 the Department of Health Services, does the Regional Board
24 do a 13241 analysis and adopt a 13242 implementation plan
25 on those new MCLs?

1 MUNICIPAL PERMITTING UNIT CHIEF

2 PONEK-BACHAROWSKI: We do not. The requirement that
3 groundwater should meet MCLs is prospective. That means
4 that anything in the future, any future MCLs, is
5 automatically the water quality objective for groundwater.
6 There's the way our Basin Plan is written.

7 MS. THORME: And you stated -- moving on to the
8 SSO WDR issue, you stated in your slides and in your
9 response to comments that the requirements that you were
10 putting in this permit were required by the Clean Water
11 Act. Can you cite me to what section of the Clean Water
12 Act requires those provisions?

13 MUNICIPAL PERMITTING UNIT CHIEF

14 PONEK-BACHAROWSKI: Not off the top of my head. But I
15 know from the Clean Water Act once that sewage is
16 released, you're already -- the discharger is in violation
17 of the Clean Water Act. And anything that we request in
18 the way of information to determine the extent and the
19 impact on receiving water is something that Regional Board
20 I believe can do.

21 MS. THORME: Okay. And have you read the State's
22 WDRs for sanitary sewer overflows?

23 MUNICIPAL PERMITTING UNIT CHIEF

24 PONEK-BACHAROWSKI: Yes, I have.

25 MS. THORME: Aren't the findings in that, that

1 that was intended to be the primary mechanism for sanitary
2 sewer overflow regulation in California?

3 SENIOR STAFF COUNSEL LEVY: Legal Order speaks
4 for itself, Mr. Chair.

5 MS. THORME: You can answer.

6 MUNICIPAL PERMITTING UNIT CHIEF

7 PONEK-BACHAROWSKI: The provisions of that permit, as I
8 understand, it says that the Regional Boards can -- that's
9 the basement that the Regional Boards can -- I don't have
10 the form. There we go.

11 That nothing in the general WDR should be -- and
12 it goes on to several things. One is interpreted or
13 implied to prohibit a Regional Board from issuing an
14 individual NPDES permit or WDR superseding this general
15 WDR for sanitary sewer system authorized under the Clean
16 Water Act or California Water Code or interpreted to or
17 applied to supercede any more specific or more stringent
18 WDRs or enforcement order issued by the Regional Board.

19 MS. THORME: In your response to comments, you
20 reference three things that are required under the federal
21 regulations which would be mitigation, proper operation
22 and maintenance, and then the reporting requirements.
23 Isn't that what the permit template that the State Board
24 has put out say that Regional Boards should be putting
25 into the permits to address sanitary sewer overflows?

1 MUNICIPAL PERMITTING UNIT CHIEF

2 PONEK-BACHAROWSKI: When you say template, are you talking
3 about the standardized permit template or are you talking
4 about the DWR?

5 MS. THORME: Yes. The standardized permit
6 template that is supposed to be used by the Regional
7 Boards now to try to streamline NPDES requirements
8 throughout the state.

9 MUNICIPAL PERMITTING UNIT CHIEF

10 PONEK-BACHAROWSKI: I think that you made the case that in
11 order for that to be applicable to all the Regional Boards
12 that it would be like an underground regulation. So it's
13 only guidance. It's not used to be used in its entirety
14 exactly.

15 MS. THORME: Did you use portions of that in this
16 permit?

17 MUNICIPAL PERMITTING UNIT CHIEF

18 PONEK-BACHAROWSKI: In that, no. This is based on the old
19 templates.

20 MS. THORME: So the new language in there about
21 the Alaska rule was not taken from the template?

22 MUNICIPAL PERMITTING UNIT CHIEF

23 PONEK-BACHAROWSKI: Actually, that template took it from
24 our previous orders that talked about the Alaska rule.

25 MS. THORME: And what evidence is there in the

1 record to justify the more stringent requirements for
2 sanitary sewer overflows for Burbank?

3 MUNICIPAL PERMITTING UNIT CHIEF

4 PONEK-BACHAROWSKI: Well, I think one specifically that
5 the Board has wanted in other NPDES permits adopted the
6 SIP particularly for Hyperion and Terminal Islands, as
7 well as Los Virgenes. The new WDR for the State requires
8 that the spill be reported in three working days.
9 Meaning, it could be five days before Regional Board staff
10 is alerted to it. The Regional Board has told us, look,
11 we want it reported sooner than that, soon as possible.
12 And that's why we have the more strict reporting
13 provisions. So that we --

14 SENIOR STAFF COUNSEL LEVY: Just to lodge an
15 objection. The question assumes there's a requirement to
16 justify a more stringent requirement than general WDRs.

17 CHAIRPERSON NAHAI: It does. And I think you
18 should both -- I'll provide additional time. But you
19 should pose your question in two questions. First of all,
20 ask the question about whether indeed it is more
21 stringent, and then secondly ask for the justification for
22 it.

23 MS. THORME: Are you saying --

24 CHAIRPERSON NAHAI: Your question assumed a fact
25 that you had not elicited any evidence as to.

1 MS. THORME: Are you stating that you don't have
2 to have findings in evidence for your requirements
3 notwithstanding some other --

4 CHAIRPERSON NAHAI: I'm not testifying here, so
5 don't ask me a question.

6 What I'm asking you to do is to -- you know very
7 well what I'm saying. Okay. Your question assumed a fact
8 that this permit was somehow discriminatory. So I am
9 asking you to put your question that you posed in two
10 questions. Ask first whether she believes it is in fact
11 more stringent as in comparison to other permits. And
12 then secondly ask for the justification if the first issue
13 is answered positively.

14 MS. THORME: I have a question. You had said
15 about 24 hour reporting in that it's not -- the SSO WDR is
16 not stringent enough. Isn't one of the requirements in
17 Section 12241, specifically Subsection L6 require 24 hour
18 reporting?

19 MUNICIPAL PERMITTING UNIT CHIEF

20 PONEK-BACHAROWSKI: I need the order in front of me here.

21 MS. THORME: I'm asking about the
22 regulations. I have a copy if you'd like to --

23 MUNICIPAL PERMITTING UNIT CHIEF

24 PONEK-BACHAROWSKI: To the State Board.

25 MS. THORME: No. I'm asking about the

1 regulations that are the three regulations that you
2 referenced in your response to comments where the things
3 that were required to be put --

4 MUNICIPAL PERMITTING UNIT CHIEF

5 PONEK-BACHAROWSKI: That's under the 40 CFR you're saying?

6 MS. THORME: Yes.

7 MUNICIPAL PERMITTING UNIT CHIEF

8 PONEK-BACHAROWSKI: What was the question?

9 MS. THORME: Doesn't that require 24 hour
10 reporting?

11 MUNICIPAL PERMITTING UNIT CHIEF

12 PONEK-BACHAROWSKI: I believe that does require 24 hour.

13 MS. THORME: What was the need for an additional
14 requirement for 24 hour reporting?

15 MUNICIPAL PERMITTING UNIT CHIEF

16 PONEK-BACHAROWSKI: Actually, I believe our reporting is
17 even -- it says as soon as possible, not greater than
18 24 hours.

19 MS. THORME: Okay. All right. Do you believe
20 the federal regulations require daily maximum limits for
21 POTWs?

22 MUNICIPAL PERMITTING UNIT CHIEF

23 PONEK-BACHAROWSKI: For toxic pollutants, yes.

24 MS. THORME: Okay. And if that requirement is
25 put in, is there anything that has to be done prior to

1 imposition of a daily maximum limit for a POTW?

2 MUNICIPAL PERMITTING UNIT CHIEF

3 PONEK-BACHAROWSKI: Yes. You must show impracticability.

4 MS. THORME: And do you believe an
5 impracticability analysis has to be done for each
6 constituent?

7 MUNICIPAL PERMITTING UNIT CHIEF

8 PONEK-BACHAROWSKI: I believe it could be done for groups
9 of constituents. Like, say, those things that are
10 performance-based versus Basin Plan objective, salt and
11 things like that. You probably make the same findings for
12 groups of constituents.

13 MS. THORME: And you stated before that the
14 federal regulations require mass limits?

15 MUNICIPAL PERMITTING UNIT CHIEF

16 PONEK-BACHAROWSKI: Yes.

17 MS. THORME: There are no exceptions?

18 MUNICIPAL PERMITTING UNIT CHIEF

19 PONEK-BACHAROWSKI: Only during storm events.

20 MS. THORME: Is there not an exception in the
21 regulations where the applicable standards or limits are
22 expressed in terms of other units of measurement?

23 MUNICIPAL PERMITTING UNIT CHIEF

24 PONEK-BACHAROWSKI: I don't believe so. We have not used
25 that in any other NPDES.

1 MS. THORME: Is concentration something you would
2 consider another unit of measurement besides mass?

3 MUNICIPAL PERMITTING UNIT CHIEF

4 PONEK-BACHAROWSKI: We always impose concentrations-based
5 limitations as well as mass based.

6 MS. THORME: But my question was would you
7 consider that concentration as another unit of measurement
8 besides mass?

9 MUNICIPAL PERMITTING UNIT CHIEF

10 PONEK-BACHAROWSKI: You know, that's hard to answer
11 because all the mass is based on the concentration times
12 flow times a variable. So I mean, it's -- the mass is
13 derived by the flow and the concentration.

14 MS. THORME: Okay. That's all the questions I
15 have.

16 CHAIRPERSON NAHAI: Thank you very much.

17 Before continuing, let me just -- there was one
18 card that I had that I didn't mention because it says the
19 person doesn't want to speak. But it's from Ms. Bonnie
20 Teaford, City of Burbank Public Works Department. And the
21 card states that she opposes Agenda Item 14. And that
22 there was another card which doesn't have a name on it,
23 but it also is in opposition to Item Number 14.

24 With that, we can go to rebuttal testimony or
25 rebuttal presentations now. Would the Board like to go

1 first or --

2 SENIOR STAFF COUNSEL LEVY: Let Burbank go first.

3 CHAIRPERSON NAHAI: Would you like to go first
4 with rebuttal presentations or testimony?

5 MR. ANDERSON: I'd prefer to go second.

6 CHAIRPERSON NAHAI: Fair enough.

7 So would you go first, please? And you can start
8 by -- you had some statements you wish to make about
9 Mr. Brock's statements.

10 SENIOR STAFF COUNSEL LEVY: That's a specialized
11 circumstance. But I'd rather have staff get up and give
12 their presentation on rebuttal first with Blythe and
13 Veronica.

14 BOARD MEMBER VANDER LANS: How much time on this?

15 CHAIRPERSON NAHAI: Ten minutes each.

16 WATER RESOURCES CONTROL ENGINEER CUEVAS: My name
17 is Veronica Cuevas, Water Resources Control Engineer with
18 Regional Water Quality Control Board. If you'll excuse
19 me, I'm not feeling that well today, so I might cough.

20 CHAIRPERSON NAHAI: Could you pull the microphone
21 a little closer to you? It's important that we hear you.

22 WATER RESOURCES CONTROL ENGINEER CUEVAS: I
23 wanted to add something to clarify. Something Ms. Thorme
24 asked Blythe what data was used to base the limits for
25 groundwater recharge. And since I wrote the permit and I

1 made the calculations, I can tell you it was effluent data
2 from the discharge 002 that was used to make the
3 calculations using the technical support document
4 procedures which show that there's reasonable potential
5 for the effluent discharge as it currently is treated
6 right now that they would cause or contribute to an
7 exceedance of the water quality objectives which are the
8 Basin Plan Water Quality Objectives under Title 22 MCLs.
9 That's it on that issue.

10 MUNICIPAL PERMITTING UNIT CHIEF

11 PONEK-BACHAROWSKI: I just wanted to again trace our
12 logical steps in why we impose limitations to protect
13 groundwater. Again, in the Basin Plan, the existing use
14 in all reaches of L.A. River except estuary is groundwater
15 recharge. In order to remove that, the Board would have
16 to de-designate those beneficial uses. As it stands right
17 now, it is in the Basin Plan and needs to be protected.
18 Again, I have -- the well data I've looked at shows there
19 is mixing of water, surface water and groundwater, in the
20 vicinity of the Glendale Narrows by the well data I
21 obtained from leaking underground storage tank section.
22 And that probably is heightened during drought conditions
23 where the water table drops or there's excess pumping.
24 And again, I want to reiterate that the groundwater
25 doesn't have to be impacted for us all to protect it.

1 WATER RESOURCES CONTROL ENGINEER CUEVAS: I
2 wanted to add that on the reasonable potential
3 determination, even the SIP recognizes that there's
4 multiple tiers of reasonable potential.

5 Tier one is when the effluent exceeds the
6 criteria.

7 Tier two is when the receding water exceeds the
8 criteria and that pollutant is also present in the
9 effluent.

10 Tier three allows you to use other information
11 that's available for you to make the conclusion that the
12 discharge could cause or contribute to an exceedance of a
13 water quality objective.

14 They mention that there was no reasonable
15 potential for certain pollutants in the fact sheet, but
16 just because there's not a calculation or calculated
17 reasonable potential does not mean that there is no tier
18 three or best professional judgement type of reasonable
19 potential. And that is the case for the objectives that
20 are in the Basin Plan such as chloride, MTDS. And I
21 believe U.S. EPA spoke to the effect on the importance to
22 prevent salt loading and protecting the water bodies
23 before they become so oversaturated with the salts that
24 POTWs or other dischargers contemplate the use of reverse
25 osmosis.

1 I also wanted to address the issue of mercury.
2 The discharger said that it was based on one DNQ value
3 when in fact it was based on two DNQ values. If you look
4 at the SIP and how you are supposed to treat effluent
5 date, DNQ values are not considered non-detect. They are
6 valid data points that can be used in reasonable potential
7 calculations. And we adequately determine reasonable
8 potential and calculated effluent limitations for mercury
9 using the SIP procedures and the California Toxics Rule.

10 The limits for cadmium and lead are based on the
11 TMDL that was adopted by the Regional Board for the Los
12 Angeles River. And I know that new 303(d) list was
13 recently approved by State Board in October. However,
14 that list is not yet official. It still has to be
15 approved by U.S. EPA. U.S. EPA has not received the
16 package from State Board yet. Although when they do
17 receive it, they do plan on approving that list. However,
18 just because something is 303(d) listed doesn't mean it
19 can be automatically erased from a TMDL. There is still a
20 procedure that has to go forward. The Regional Board has
21 to revise the TMDL and make it conform with the newest
22 303(d) list. I have no idea when that's going to take
23 place.

24 But we do have a reopener in our permit that if
25 there is a change in the TMDL, our permit can be reopened

1 to make the limits conform with changes to the TMDL for
2 L.A. River or whichever other TMDL might be adopted by
3 this Regional Board in the future once it becomes
4 effective.

5 And the daily maximum issue has already been
6 addressed, but I'd like to add that the SIP contains
7 procedures for calculating daily max and monthly average
8 limits to protect human health and implement the CTR
9 criteria. And as Blythe mentioned in the presentation,
10 there's nothing in the SIP that bars us from using those
11 calculations to calculate effluent limitations on a daily
12 max basis for those pollutants. And this is consistent
13 with the petition that County San had brought forth
14 arguing similar issues when those permits were brought
15 before you way back in I think it was 2002.

16 I think that's all I have for now.

17 MUNICIPAL PERMITTING UNIT CHIEF

18 PONEK-BACHAROWSKI: I think we're probably done. Any
19 questions you'll have --

20 SENIOR STAFF COUNSEL LEVY: We have a few more
21 comments from counsel.

22 MUNICIPAL PERMITTING UNIT CHIEF

23 PONEK-BACHAROWSKI: Sorry to cut you off.

24 SENIOR STAFF COUNSEL LEVY: First of all, the
25 comment -- staff made a bold comment earlier about

1 requiring -- being required legally to put effluent limits
2 in permits that would implement waste load allocations in
3 the absence of reasonable potential. That's an
4 outstanding issue, and we treat that as discretionary.
5 But it certainly is appropriate to include effluent limits
6 that are derived from the TMDL base load allocations to
7 include that in the permit.

8 The second issue, Mr. Brock's comments. And I
9 would like to read from the general WDR's finding 11 on
10 page 2 to 3 of the Order itself, the general WDR's Order.
11 It says, "This Order establishes minimum requirements to
12 prevent SSOs. Regional Boards may issue more stringent or
13 more prescriptive WDRs for sanitary sewer systems."

14 Furthermore, on page 7, paragraph D2, III and IV
15 its says, "Provisions. It is the intent of the State
16 Water Board that sanitary sewer systems be regulated in a
17 manner consistent with the general WDRs. Nothing in the
18 general WDRs shall be interpreted or applied to prohibit a
19 Regional Board from issuing an individual NPDES permit or
20 WDR superseding the general WDR for a sanitary sewer
21 system authorized under the Clean Water Act or the
22 California Code, or nothing in the general WDR shall be
23 interpreted or applied to supercede any more specific or
24 more stringent WDRs or Enforcement Order issued by
25 Regional Water Board."

1 That's also borne out on page 9 of the fact sheet
2 which Mr. Brock didn't read. He stopped at page 8.

3 On the final issue that Ms. Thorme raised about
4 what becomes when the court issues a stay of effluent
5 limitations, the Board issued its new permit, and some 30
6 effluent limitations were stayed by operation of the
7 court. And Burbank's position seems to be that based upon
8 that stay coupled with the Order's language that this
9 Order supercedes and revokes the previous permit. Means
10 that there is now no effluent limitation whatsoever in
11 place during the period of this stay. That's a legally
12 untenable position.

13 Our revocation of the previous permit is
14 dependant upon the enforcability of the new permit's
15 provisions. So reverting to the enforceability of the old
16 analogous effluent limitations is perfectly appropriate
17 and proper. And there is no need for the Board to have a
18 secondary hearing to bridge the gap when the court issues
19 a stay.

20 One more thing was further background on the L.A.
21 Burbank case. As you know, this was in 1998 permit that
22 was challenged. It did go all the way up to the
23 California Supreme Court. The California Supreme Court
24 upheld the permit in most respects but issued a ruling
25 that whenever a Regional Board goes beyond federal law,

1 the Regional Board must do a 13241 analysis. That's
2 because the permitting statute Section 13263 says when
3 you're adopting permits you've got to consider the factors
4 in Section 13241. 13241 is the section that we cite to or
5 that we look to when we're adopting water quality
6 objectives.

7 As Blythe Ponek-Bacharowski mentioned a few
8 moments ago, bis(2-ethylhexyl)phthalate -- did that by
9 memory -- is the only one that is more stringent in
10 federal law now, because we're implementing the CTR which
11 is federal law and other federal requirements as well.

12 So notwithstanding the fact that Judge Janoffs
13 found some dozen effluent limitations to go beyond federal
14 law, the only one in this permit is the
15 bis(2-ethylhexyl)phthalate.

16 Thank you very much.

17 CHAIRPERSON NAHAI: Thank you. Anything more in
18 rebuttal?

19 All right. Mr. Anderson.

20 MR. ANDERSON: Thank you very much.

21 I wanted to first say we seem to be difficult
22 here as far as how these permit provisions are being
23 adopted and what's being put on us. But if you look at
24 the construction that we've done, the studies that we're
25 doing, the operation of our plant, and how we conduct

1 ourselves, I believe we're really one of the good guys.
2 We've doing a good job. We're not letting our plant fall
3 into disrepair. We're not letting harmful levels go out
4 of the channel. So lest our disagreement on some of these
5 issues make it seem like we're lazy in not wanting to
6 operate our plant properly, that's not the case. We just
7 want to make sure that the proper procedures are followed,
8 proper laws are followed. That's why we raise so many
9 issues through this.

10 I wanted to comment on just a few issues that
11 were brought up in rebuttal here. First of all, the
12 justification of daily limits. And I believe it might
13 have been the EPA who stated they're relying on guidance
14 to use those daily limits. I don't believe the guidance
15 can be used to overrule regulation that was around before
16 the 1998 permit. The judge ruled daily max limits are not
17 authorized without impracticability analysis. So
18 especially for human health, unless that impracticability
19 is shown when there needs to be daily limits, we disagree
20 with that.

21 It was also mentioned limits for chloride and TDS
22 that it can create a large salt problem in the water
23 bodies. There is no evidence there is a salt problem.
24 It's more of an ag issue. Up north there is no MUN use in
25 the L.A. River. We don't need to have a watershed program

1 on salt, so we would disagree on that.

2 It was discussed just recently regarding using
3 BPJ in addition to doing the RPA for creating limits. It
4 seems like BPJ then negates the whole RPA analysis then if
5 you can get and say there's no reasonable potential, but
6 we still want to put it in. Makes RPA seem moot to me. I
7 don't think that's a proper use of BPJ.

8 It was mentioned that cadmium is discretionary.
9 It's something that's in the TMDL that it doesn't
10 necessarily have to be a permit limit, especially when
11 there's no impairment of the water body. We would ask --
12 specifically for cadmium, if it is discretionary it not be
13 a permit limit. There's not an issue. I've testified
14 many times on that. I won't go into that.

15 On the issue of MCLs, it was stated that MCLs
16 logically apply to groundwater recharge. I don't believe
17 you can just say, well, it logically is that if you have
18 to show it in the findings. In fact, there was a number
19 of studies that were cited too or measurements of
20 groundwater depth that were mentioned today that we didn't
21 see in the findings. They have been presented to us. I
22 haven't seen those studies. So to introduce those today
23 without having it be in the findings, we can't see where
24 were those wells and what did those levels apply to.

25 On the issue of toxicity, we've mentioned when we

1 do our response when we've had exceedances in toxicity,
2 that was largely due to ammonia. Since we've implemented
3 NDN, that acute toxicity has really gone away.

4 A question was raised regarding RPA and why that
5 was not done on data prior to 2003 for other pollutants.
6 We've experienced being an operator of a treatment plant
7 when you change the whole biological system of the
8 treatment plant, you don't only effect certain
9 constituents. It doesn't only effect nitrogen, ammonia,
10 nitrate, nitrite, those species. It really effects
11 everything. It makes a big difference. For one, we've
12 seen our turbidity drop off. We have amazingly clear
13 water now if you look in our chlorine content tanks. It
14 makes a difference on really everything when you change
15 your whole biological system. So I wanted to respond to
16 that question.

17 Los Angeles made a comment that annual averages
18 should be used if MCLs are used at all. I just wanted to
19 respond to that and say we agree with that and we want to
20 incorporate their comments, even their comments on their
21 permit hearing next month into our comments.

22 As far as the groundwater, I just want to mention
23 again it was stated that it would be protective to put in
24 groundwater limits. What becomes difficult for us is we
25 get -- we are required to do studies for upwelling

1 groundwater. Then we're given permit limits for recharge
2 groundwater. We being hit both ways. It's happened with
3 mixing zones before. A permit gives no mixing zone
4 allowance. And yet when we do a copper translator study,
5 we're required to do mixing zone studies. These issues
6 where we get hit coming and going make it very difficult
7 for us.

8 Finally, on the SSO provisions it was just
9 mentioned that the WDR say they can be more stringent,
10 that you can issue regulations that are more stringent
11 than the state-wide WDRs. Those are the base line. In
12 essence, I would agree with that. But I would say if
13 there's findings that show you need to have more stringent
14 that what's statewide and if it's done across the board,
15 yes, can you be more stringent than statewide? Sure. But
16 is there a good reason to be? Is it because you're
17 recycling water that you should be hit with more? Or
18 should be across the board or towards those that are
19 having excessive amounts of overflows. Are those ones
20 that should be hit? That's the response to that comment.

21 And that ends my testimony.

22 CHAIRPERSON NAHAI: Thank you very much. Let me
23 talk to the Board members. Now is the time for Board
24 deliberations. We can do it now or take a break and come
25 back and do it after lunch. It's fine for me either way.

1 BOARD MEMBER HERMAN: Questions for staff?

2 BOARD MEMBER LUTZ: Why don't we take a lunch and
3 come back?

4 BOARD MEMBER CLOKE: I could do whatever, but I
5 can also wait. I can do whatever.

6 CHAIRPERSON NAHAI: How many closed session items
7 do we have to talk about?

8 SENIOR STAFF COUNSEL LEVY: Nothing voluminous.
9 Four items -- two or four items we might say something
10 about, discuss very briefly, but it won't take long.

11 BOARD MEMBER VANDER LANS: How about a short
12 break then, 40 minutes?

13 CHAIRPERSON NAHAI: Okay. We can take a
14 45-minute lunch break, because we have to go and actually
15 get it. So we'll take a 45-minute lunch break and come
16 back and resume with Board deliberations at that point.

17 STAFF COUNSEL FORDYCE: Mr. Chair, the following
18 items will be discussed during closed session: Item 20.2,
19 the Los Angeles River Trash TMDL; 20.3, the L.A. County
20 MS4 permit; 20.7 the 2004 triennial review; and 20.8, the
21 L.A. River and Ballona Creek.

22 (Thereupon a lunch recess was taken.)

23 CHAIRPERSON NAHAI: Okay. We're going to resume.
24 And we're going to have Board deliberation. Let me find
25 out from everyone what questions each person may wish to

1 pose.

2 BOARD MEMBER VANDER LANS: Staff questions.

3 BOARD MEMBER MARIN: Just staff.

4 BOARD MEMBER CLOKE: At least to start with,
5 staff. Maybe later somebody else.

6 BOARD MEMBER HERMAN: Mr. Anderson.

7 BOARD MEMBER LUTZ: All my questions got answered
8 in rebuttal. So no.

9 BOARD MEMBER CLOAK: Staff.

10 CHAIRPERSON NAHAI: And I have questions only for
11 staff as well. So -- you can't hear me?

12 MR. ANDERSON: I couldn't hear her.

13 CHAIRPERSON NAHAI: What I asked each Board
14 member was who they might have questions for. And Board
15 Member Herman indicated she would have a question for you,
16 Mr. Anderson. But first of all, we all have questions for
17 staff. So we're going to pose questions to staff first
18 and then to you.

19 Who's going to respond to our questions?

20 SENIOR STAFF COUNSEL LEVY: Really depends on the
21 question you're asking.

22 CHAIRPERSON NAHAI: Well, I think you need to --
23 okay. I'm going to start with Mr. Vander Lans. Would you
24 like to lead us off?

25 BOARD MEMBER VANDER LANS: All right. My

1 question deals with cadmium. If I understood correctly,
2 it is Burbank's position it doesn't exist. Do you agree
3 with that?

4 WATER RESOURCES CONTROL ENGINEER CUEVAS: The
5 metals TMDL has a waste load allocation for cadmium, and
6 it's based on an old 303(d) listing. The TMDL has been
7 approved by the PI and it is in effect. EPA has told us
8 in the past when there is a TMDL that's in effect we must
9 implement the TMDL through the NPDES permit, especially if
10 there's a specific waste load allocation for a specific
11 discharger. In this case, there's a waste load allocation
12 for cadmium for Burbank Water Reclamation Plant.

13 We're including limits based on that TMDL waste
14 load allocation, but we do understand there have been more
15 developments when the revised 303(d) list. And in the
16 future, it appears as though the cadmium waste load
17 allocation would be removed from the NPDES permit.
18 However, this permit has a reopener that allows us to
19 update the permit in accordance with future TMDL changes
20 and the cadmium limit in the permit as it stands is not in
21 effect until January 2011. So the discharger is in no
22 peril in terms of possibly getting fines for exceeding
23 that because they don't have an effective limit until
24 January 2011.

25 EXECUTIVE OFFICER BISHOP: Let me get to the core

1 of your question, which is there is a post-303(d) list
2 which would remove cadmium. When that happens, if that
3 happens, we will make an amendment to the metals TMDL, in
4 which case it would move it from the metals TMDL, in which
5 case it would be removed from the permit. These steps
6 have to be followed, and that's the way we would propose
7 to do it.

8 BOARD MEMBER VANDER LANS: I will accept your
9 view it has to be done. But I also assume that if what
10 I've heard is correct, it will be delisted and therefore
11 removed.

12 EXECUTIVE OFFICER BISHOP: It's proposed to be
13 delisted. Until it actually happens, I can't tell you it
14 will. When that happens, then we will take the
15 appropriate actions.

16 MUNICIPAL PERMITTING UNIT CHIEF
17 PONEK-BACHAROWSKI: There's one other wrinkle. By the
18 time that comes around, we would be doing RPA on these
19 permits. If the cadmium comes up and there's reasonable
20 potential, we'll still get a limit.

21 BOARD MEMBER VANDER LANS: That I understand.
22 But so far it hasn't.

23 CHAIRPERSON NAHAI: May I pose a follow-up
24 question? Because I think your answer was very
25 formalistic. But I think it misses the main point of the

1 question, which is that if it is going to be delisted,
2 what is it that the permittee has to do in the mean time
3 to comply? And because we don't want to be put into the
4 position of putting a permittee to expense and to
5 shouldering additional burdens to meet a limit that is in
6 all likelihood going to not apply in the near future. So
7 will you respond to that what is it that we're doing to
8 ask the permittees in the mean time?

9 BOARD MEMBER VANDER LANS: Excuse me, Mr.
10 Chairman. My understanding from what I heard is they have
11 to do nothing.

12 CHAIRPERSON NAHAI: This is what I want to get on
13 the record.

14 EXECUTIVE OFFICER BISHOP: That is correct.
15 There is a Time Schedule Order that gives them until 2011
16 to meet that requirement. So there's ample time for us to
17 go through that.

18 SENIOR STAFF COUNSEL LEVY: Pardon me, Mr. Chair.
19 I need to step in just a little bit for some
20 clarification.

21 The point of view that effluent limitations must
22 include waste load allocations if there's a TMDL is not a
23 settled issue. And there is an argument that it's
24 discretionary if there's no reasonable potential. And I
25 just want to make that clear with the Board. I don't want

1 there to be a bold statement that says we're absolutely
2 required to do it. We certainly have discretion to do it.
3 But it's my position it's discretionary if there's no
4 reasonable potential. That comes from the language in
5 122.44(d)(1)(7) which says, "When developing water quality
6 based effluent limitations, there shall be effluent
7 limitations that are consistent with the assumptions and
8 requirement of the waste load allocation."

9 It hasn't been squarely answered if effluent
10 limitations are not otherwise required whether a waste
11 load allocation -- the presence of a waste load allocation
12 itself is enough to require that a waste load allocation
13 be turned into an effluent limitation. It's certainly
14 appropriate to do it as a matter of discretion. It's a
15 question about whether you're legally required to do it.

16 BOARD MEMBER VANDER LANS: Counsel, I got the
17 impression from the answers I got we were required to do
18 it, and you're telling me -- if I understand you, you are
19 saying it is discretionary.

20 SENIOR STAFF COUNSEL LEVY: I'm saying there is a
21 legal argument that it's discretionary is what I'm telling
22 you. I think it may be a cogent legal argument. So I'd
23 rather you act based upon discretion rather than what you
24 think is legally required.

25 EXECUTIVE OFFICER BISHOP: Can I -- you know,

1 what you said was -- my understanding is that the permit
2 has to be consistent with the assumptions in the TMDL and
3 the assumptions of waste load allocation. I can't
4 remember the exact wording you used. Which is different
5 than saying that you have full discretion of not
6 addressing the TMDL. Now, it may be true you don't have
7 to use the exact waste load allocation, but you have to
8 address the assumption in TMDL; is that correct?

9 SENIOR STAFF COUNSEL LEVY: What the regulation
10 says is when developing water quality based effluent
11 limitations under this paragraph, the permitting authority
12 shall ensure that effluent limitations developed to
13 protect a narrative or numeric criterion are consistent
14 with the assumptions and requirements of any available
15 waste load allocation.

16 The question comes from the language "when
17 developing." And if you read earlier in the regulation,
18 it says you must have effluent limitations when there is a
19 reasonable potential. So the question comes up if there
20 is no reasonable potential and therefore you don't need an
21 effluent limitation, if you have a TMDL, must that TMDL
22 waste load allocation be turned into an effluent
23 limitation?

24 What I'm telling you is it's an open question
25 about whether it must or must not. So if you're going to

1 do it, I would rather you do it as a matter of discretion
2 rather than as a matter of legal requirement. It's
3 certainly appropriate that your permits factor TMDLs.
4 It's certainly appropriate that the permits implement the
5 provisions of TMDLs including the waste load allocations.
6 And it's certainly appropriate that each permit actually
7 tracks the TMDL so that you can look to the TMDL where
8 there's a waste load allocation assigned and say there it
9 is in that permit whether or not there's reasonable
10 potential.

11 CHAIRPERSON NAHAI: You know, it seems to me a
12 bit of an absurd result what you're saying. Because if we
13 follow it through, that would be saying that a Board goes
14 through the entire TMDL process with all of the hearings.
15 That then goes up to the State Board as to whether waste
16 load allocations or load allocations were properly done.
17 That then goes to the Office of Administrative Law. That
18 then goes to the EPA. And a Basin Plan amendment, the
19 TMDL is adopted. But what we all know the TMDL, in order
20 for it to be fully implemented, has to be somehow
21 translated into a permit, which in our case is the NPDES.
22 And we also know you have to have another hearing in order
23 to incorporate the TMDL limits into a permit. But to say
24 then that to do that is entirely discretionary, it would
25 mean that one success award could make a mockery out of

1 TMDLs adopted by a predecessor Board and then approved
2 finally by the EPA, which has then become a Basin Plan
3 amendment.

4 SENIOR STAFF COUNSEL LEVY: Everything you're
5 saying is correct. But now let me explain.

6 CHAIRPERSON NAHAI: I hope it's not correct.

7 SENIOR STAFF COUNSEL LEVY: Your arguments are
8 cogent.

9 What I'm saying though is for any permit, you
10 only need an effluent limitation when there is reasonable
11 potential.

12 EXECUTIVE OFFICER BISHOP: Excuse me, Michael.
13 I'm sorry to interrupt, but in the State Implementation
14 Plan, it says you need to do reasonable potential analysis
15 for water-quality based effluent limits for all priority
16 pollutants except when there is a TMDL developed.

17 SENIOR STAFF COUNSEL LEVY: I agree you do not
18 need to do reasonable potential analysis when there is a
19 TMDL. That's not the question we're addressing. The
20 question is when there is not reasonable potential, must
21 you included the waste load allocation in the permit. The
22 point is ---

23 BOARD MEMBER VANDER LANS: Is there a reasonable
24 potential for cadmium?

25 BOARD MEMBER CLOKE: What does cadmium come from?

1 It comes from industrial waste, right?

2 MUNICIPAL PERMITTING UNIT CHIEF

3 PONEK-BACHAROWSKI: Metal plating and things like that.

4 BOARD MEMBER CLOKE: Is there industrial waste in
5 this district?

6 MUNICIPAL PERMITTING UNIT CHIEF

7 PONEK-BACHAROWSKI: Oh, yes. They have a very active
8 pre-treatment program.

9 BOARD MEMBER CLOKE: So it's reasonable to
10 anticipate --

11 EXECUTIVE OFFICER BISHOP: We can't say that,
12 because we didn't conduct reasonable potential analysis
13 because there was a TMDL for the waste load allocation.

14 BOARD MEMBER CLOKE: I understand that. But in
15 the non-legalistic world, but just in the common sense
16 world, if they do industrial work, then this is where it
17 comes from. And while legally is one track, there's
18 another question that's going on in the minds of us who
19 are more practical. And you know, if you can make a legal
20 argument it belongs here, can you also make a practical
21 argument that it's possible? If it came from something
22 that never happened in Los Angeles, then we shouldn't be
23 talking about it. But since it does happen here and it is
24 practically possible and it's also legally, you know --

25 SENIOR STAFF COUNSEL LEVY: John is absolutely

1 right. You do not have to do reasonable potential
2 analysis for the purpose of implementing waste load
3 allocations into a permit. That's absolutely true.

4 But the question that's before us is not that.
5 The question is if there isn't a reasonable potential.
6 Because the discharger is not discharging amounts of the
7 constituent that would cause a reasonable potential.

8 CHAIRPERSON NAHAI: But you're making a circular
9 statement, with all due respect. You can't on the one
10 hand say if you've adopted a TMDL, you don't have to do a
11 reasonable potential analysis. And then say, if only you
12 do a reasonable potential analysis, then you have to
13 have -- one thought defeats the other.

14 Let's just go back to do what we did with respect
15 to the bacteria TMDL. We adopted a bacteria TMDL. And in
16 that bacteria TMDL, it said these limits are going to be
17 incorporated into the MS4 permit. And we had an MS4
18 permit, and we adopted those limits as part of the MS4
19 permit. I mean, to say that having adopted the bacteria
20 TMDL limit we then have discretion as to whether they
21 should be made part of the MS4 permit, it's --

22 SENIOR STAFF COUNSEL LEVY: I'm saying it's an
23 open legal question.

24 BOARD MEMBER CLOKE: But it's like saying the
25 TMDL was wrong.

1 SENIOR STAFF COUNSEL LEVY: I can't answer that.
2 All I'm saying is it's an open legal question about the
3 legal requirement. There's the two sides of it that have
4 been presented to you. It is perfectly appropriate to do
5 it. The question about it being legally mandated though
6 is an open question.

7 CHAIRPERSON NAHAI: I understand. Your view of
8 it is if we exercise our discretion to do it, then it
9 shows that, as we're doing, we're deliberating this.
10 We're thinking about every nuance of it. We're asking
11 questions. We're asking whether cadmium, even though it
12 was a TMDL base limit, whether adopting it here as part of
13 this permit would be unduly burdensome to the permittee.
14 And if so, what can be done about that.

15 So yes, we're not proceeding as if we're under
16 some kind of regime that doesn't allow us the ability to
17 pose questions. And we're doing that. We're having and
18 going to have even more of a deliberative process.

19 I just think as a general legal statement to say
20 that whenever you've adopted a TMDL that that means that
21 in effect the limits in that TMDL can be somehow set aside
22 by a later Board exercising its discretion --

23 SENIOR STAFF COUNSEL LEVY: I didn't say that. I
24 didn't say that.

25 BOARD MEMBER VANDER LANS: Mr. Chairman, I think

1 we're flogging a horse that's almost dead.

2 CHAIRPERSON NAHAI: I just want to make sure we
3 kill it good and proper.

4 BOARD MEMBER VANDER LANS: This issue won't
5 really arise until the year '11. Then I would hope that
6 we will find out shortly before then or long time before
7 then it's delisted and the reopener will take it off.

8 EXECUTIVE OFFICER BISHOP: We would expect to
9 know about the delisting within six months. Because it
10 will go to EPA for approval. They have a certain time
11 frame to approve that. I can't on the top of my head
12 remember what that is, but it's not very long.

13 BOARD MEMBER VANDER LANS: Would you inform us
14 when this occurs?

15 EXECUTIVE OFFICER BISHOP: I will.

16 BOARD MEMBER VANDER LANS: That's it.

17 BOARD MEMBER MARIN: Actually, that was my
18 question about discretion and cadmium.

19 BOARD MEMBER CLOKE: I want to ask you to look at
20 page 193 and -4. These are the SSO pages. And just to
21 help me understand, so if you look at item 2a, it says the
22 discharger shall immediately notify the local health
23 agency. Do they also notify us?

24 MUNICIPAL PERMITTING UNIT CHIEF

25 PONEK-BACHAROWSKI: That actually comes from the Health

1 and Safety Code. No. It says that they have to report to
2 the local health agency immediately. What we have for us
3 is B. B is a reporting requirement for the Regional
4 Board.

5 BOARD MEMBER CLOKE: What does immediately mean
6 in the local health agency expectation?

7 MUNICIPAL PERMITTING UNIT CHIEF

8 PONEK-BACHAROWSKI: I can't answer that. There's no
9 definition in the Code.

10 VICE CHAIRPERSON DIAMOND: It says no later than
11 24 hours.

12 BOARD MEMBER CLOKE: That's for us. For us it's
13 no later than 24 hours. But for them it just says
14 immediately. And I don't know what immediately means.

15 If there is a spill, which of course we hope
16 there never is, but if there is one, then where does it
17 get posted? Like we heard Mr. Secundy talking about the
18 new State computer system. We have our own computer
19 pages. Where do the spills get posted so that a public
20 person could know about it?

21 MUNICIPAL PERMITTING UNIT CHIEF

22 PONEK-BACHAROWSKI: Right now the way it is, any sewer
23 spill of 1,000 gallons or more must be reported to the
24 Office of Emergency Services. Okay. And at that time,
25 the Office of Emergency Services they notify and 24 hours

1 a day, seven days a week, sometimes at 2:00 in the
2 morning, they alert the Regional Board, the Coast Guard if
3 appropriate, California Fish and Game, the local health
4 agencies, and the local responders.

5 EXECUTIVE OFFICER BISHOP: I think the question
6 you are asking is when the Health Department makes a
7 determination there is a potential threat based on a
8 sewage spill, how does the public get notified? They get
9 notified by a posting on the beach.

10 I'm working with the County Health Department.
11 I've talked to them a couple times. I'm going to be going
12 to their meeting when they have one that's not on the day
13 of our Board meeting to talk to their Commission about the
14 same issue about alternate ways they can notify people.
15 But right now it's just through postings.

16 BOARD MEMBER CLOKE: So I don't know if it's
17 appropriate to include it in the revised tentative or
18 whether it's better to just have it be a direction to
19 staff. But I'm really interested both in public
20 notification and in the applicant providing a hot line
21 number, a contract number to people can have information.
22 I'm really interested in the public notification.
23 Something we hope never will happen, but we're humans.
24 We're error. And so maybe you might want to think about
25 what would be an appropriate way to incorporate some kind